

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Protecting and Promoting the Open Internet ) GN Docket No. 14-28

**ORDER DENYING STAY PETITIONS**

**Adopted: May 8, 2015**

**Released: May 8, 2015**

By the Chiefs, Wireline Competition Bureau and Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On May 1, 2015, two petitions for stay of the *2015 Open Internet Order* were filed, pending judicial review, by: (1) United States Telecom Association (“USTelecom”), CTIA-The Wireless Association, AT&T Inc., Wireless Internet Service Providers Association (“WISPA”), and CenturyLink;<sup>1</sup> and (2) American Cable Association (“ACA”) and the National Cable & Telecommunications Association (“NCTA”)<sup>2</sup> (together, “Petitioners”). On May 7, 2015, Cogent filed an opposition to both stay requests.<sup>3</sup> For the reasons discussed below, we deny the Petitioners’ requests for stay.

**II. BACKGROUND**

2. On May 15, 2014, the Federal Communications Commission (“Commission”) launched a rulemaking seeking public comment on how best to protect and promote an open Internet. The Notice of Proposed Rulemaking (NPRM) initiating that proceeding posed a broad range of questions to elicit input from the public, including whether the Commission should invoke its Title II authority to reclassify fixed and mobile broadband Internet access service (BIAS) as a telecommunications service.<sup>4</sup> On February 26, 2015, after receiving almost four million comments and engaging in public workshops and numerous *ex parte* meetings, the Commission adopted “carefully-tailored rules to protect Internet openness” that it

<sup>1</sup> Joint Petition for Stay of United States Telecom Association, CTIA – The Wireless Association, AT&T Inc., Wireless Internet Service Providers Association, and CenturyLink, GN Docket No. 14-28 (filed May 1, 2015) (“USTelecom *et al.* Petition”).

<sup>2</sup> Petition of American Cable Association and National Cable & Telecommunications Association for Stay Pending Judicial Review, GN Docket No. 14-28 (filed May 1, 2015) (“ACA/NCTA Petition”).

<sup>3</sup> Opposition of Cogent Communications, Inc. to Joint Petitions for Stay Pending Judicial Review, GN Docket No. 14-28 (filed May 7, 2015) (“Cogent Opposition”).

<sup>4</sup> See, e.g., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5612-13 para. 148 (2014) (*2014 Open Internet NPRM or NPRM*) (“We seek comment on whether the Commission should rely on its authority under Title II of the Communications Act, including both (1) whether we should revisit the Commission’s classification of broadband Internet access service as an information service and (2) whether we should separately identify and classify as a telecommunications service a service that ‘broadband providers . . . furnish to edge providers.’ For either of these possibilities, we seek comment on whether and how the Commission should exercise its authority under section 10 (or section 332(c)(1) for mobile services) to forbear from specific obligations under the Act and Commission rules that would flow from the classification of a service as telecommunications service.” (footnotes omitted) (citing *Verizon v. FCC*, 740 F.3d 623, 656 (D.C. Cir. 2014)).

found will “allow investment and innovation to continue to flourish.”<sup>5</sup> These rules were crafted to apply a light-touch approach that would preserve an open Internet for consumers of both fixed and mobile services.<sup>6</sup>

3. In the *Order* the Commission defined BIAS as “a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.”<sup>7</sup> The Commission adopted three “bright-line” rules applicable to both fixed and mobile BIAS that prohibit blocking, throttling, and paid prioritization. The Commission also enhanced the transparency rule adopted in 2010.<sup>8</sup>

4. The Commission recognized that the three bright line rules, while a “critical cornerstone in protecting and promoting the open Internet,” nonetheless did not encompass all potential BIAS provider conduct that would harm the open Internet.<sup>9</sup> To ensure its ability to fully evaluate and address broadband provider conduct harming Internet openness the Commission created rules to complement the bright line rules, employing mechanisms to evaluate conduct on a case-by-case basis. In the case of Internet traffic exchange, the *Order* established that the Commission will rely upon case-by-case evaluations of BIAS provider conduct under the general framework of sections 201 and 202 of the Communications Act of 1934, as amended (Communications Act or Act), which assesses whether actions are just and reasonable.<sup>10</sup> Specifically, the Commission concluded that the record “demonstrates that broadband Internet access providers have the ability to use terms of interconnection to disadvantage edge providers and that consumers’ ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs.”<sup>11</sup>

5. Outside the Internet traffic exchange context, the Commission adopted a legal standard tailored to the open Internet context. That “general open Internet conduct” rule prohibits BIAS providers from unreasonably interfering with or unreasonably disadvantaging the ability of consumers to select, access, and use the lawful content, applications, services, or devices of their choosing; or of edge providers to make lawful content, applications, services, or devices available to consumers.<sup>12</sup> As the Commission explained in the *Order*, “[b]ased on our findings that broadband providers have the incentive and ability to discriminate in their handling of network traffic in ways that can harm the virtuous cycle of innovation, increased end-user demand for broadband access, and increased investment in broadband network infrastructure and technologies, we conclude that a no-unreasonable interference/disadvantage standard to protect the open nature of the Internet is necessary.”<sup>13</sup> As was the case with the “no

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<sup>5</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, at para. 4 (rel. March 12, 2015) (*2015 Open Internet Order or Order*).

<sup>6</sup> *2015 Open Internet Order* at para. 5.

<sup>7</sup> *2015 Open Internet Order* at para. 25. The definition “also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.” *Id.*

<sup>8</sup> *2015 Open Internet Order* at paras. 162-81.

<sup>9</sup> *2015 Open Internet Order* at para. 135.

<sup>10</sup> 47 U.S.C. §§ 151 et seq.; *2015 Open Internet Order* at paras. 194-206.

<sup>11</sup> *2015 Open Internet Order* at para. 205.

<sup>12</sup> *2015 Open Internet Order* at paras. 133-37.

<sup>13</sup> *2015 Open Internet Order* at para. 136 (footnotes omitted).

unreasonable discrimination” standard adopted in 2010, the Commission provided guidance on how that open Internet standard will be applied in practice.<sup>14</sup>

6. Based on the record before it, the Commission reclassified BIAS as a telecommunications service.<sup>15</sup> The Commission also revisited its prior classification of mobile BIAS, finding that it is best viewed as commercial mobile service, and in any event that it is the functional equivalent of commercial mobile service and therefore not a private mobile service.<sup>16</sup> While finding that BIAS is subject to Title II, the Commission forbore from applying many provisions of Title II with respect to that service, including those that could have required *ex ante* rate regulation, tariff filing, and unbundling. However, the Commission did not forbear from statutory provisions that it determined to be necessary to protect the public interest, including, but not limited to sections 201, 202, 208, 222, and 224.<sup>17</sup>

7. On May 1, 2015, Petitioners filed two separate petitions for stay of the open Internet rules, pending judicial review of the *Order*. Both petitions seek a stay of the *Order*'s classification of BIAS as a telecommunications service and of the general conduct standard.<sup>18</sup> Neither petition seeks a stay of the three “bright-line” open Internet rules adopted in the *Order*.<sup>19</sup> Petitioners request a ruling on their petitions by May 8, 2015, “[t]o allow adequate time for a judicial stay determination, if necessary.”<sup>20</sup>

### III. DISCUSSION

8. In determining whether to stay the effectiveness of one of its Orders, the Commission applies the traditional four-factor test established by the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”).<sup>21</sup> To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay. For the reasons described below, we establish by looking at the petitions, the opposition, and the language of the Commission’s *Order* that Petitioners have failed to meet the test for this extraordinary equitable relief.

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<sup>14</sup> 2015 *Open Internet Order* at para. 68. See also *id.* at paras. 138-53 (discussing factors to guide application of the rule, including in the mobile context, and related issues).

<sup>15</sup> 2015 *Open Internet Order* at paras. 306-87.

<sup>16</sup> 2015 *Open Internet Order* at para. 48.

<sup>17</sup> 2015 *Open Internet Order* at para. 456 (listing all statutory sections that the Commission where the forbearance standard is not met). See generally, 2015 *Open Internet Order* at paras. 440-536 (providing forbearance analysis).

<sup>18</sup> USTelecom *et al.* Petition at 1; ACA/NCTA Petition at 1. The general conduct standard referred to by Petitioners is set forth in Appendix A of the *Order* as new Section 8.11 of the Commission’s rules.

<sup>19</sup> USTelecom *et al.* Petition at 2; ACA/NCTA Petition at 1 n.3. A third petition for stay also was filed, which sought a stay of the entire *Order*, including the bright-line rules. That stay request is addressed in another *Order*. Petition for Stay Pending Judicial Review of Daniel Berninger, Founder of the Voice Communication Exchange Commission, GN Docket No. 14-28 (filed Apr. 27, 2015).

<sup>20</sup> USTelecom *et al.* Petition at 2. See also ACA/NCTA Petition at 30 (“Petitioners respectfully request that the Commission act on this petition by May 8, 2015, so that the court of appeals has adequate time to consider petitioners’ application for the same relief, should that become necessary.”).

<sup>21</sup> See *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

**A. Likelihood of Success on the Merits**

9. Petitioners have failed to demonstrate that they are likely to succeed on the merits.<sup>22</sup> The Commission's classification of fixed and mobile BIAS as telecommunications services falls well within the Commission's statutory authority, is consistent with Supreme Court precedent, and fully complies with the Administrative Procedure Act.

10. *Statutory Authority to Classify Broadband Internet Access Service.* Petitioners first argue that BIAS cannot lawfully be classified as a telecommunications service and subject to Title II of the Act.<sup>23</sup> Specifically, Petitioners argue: (1) the Commission's classification contradicts the Supreme Court's holding in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*<sup>24</sup>; and (2) the Commission was wrong to find that BIAS fits the definition of telecommunications service. We address each argument in turn.

11. *Brand X.* Petitioners claim that the *Order's* classification of BIAS as a telecommunications service conflicts with *Brand X*. Specifically, Petitioners argue that the *Order* contradicts *Brand X's* conclusion that cable modem service is an information service and that, in any event, *Brand X* is "irrelevant" to the BIAS service classified in the Commission's *Order*.<sup>25</sup> Petitioners both misread *Brand X* and misconstrue the *Order*.

12. Petitioners first argue that the *Order* contradicts the *Brand X* majority's conclusion that cable modem service is an information service. That conclusion, however, was predicated on the Court's holding that the statute's use of the term "offering" in the definitions of telecommunications and information services was ambiguous. Deferring to the Commission, the Court therefore upheld the Commission's finding that cable modem service was a functionally integrated offering of an information service as a permissible (although perhaps not the best) interpretation of the Act.<sup>26</sup> Notably, *Brand X* also explained that "[A]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances . . ."<sup>27</sup> Thus, consistent with *Brand X*, the Commission has now properly revisited its prior interpretation of these ambiguous statutory terms, and on the basis of the current record, reasonably concluded that the specific service that is BIAS is best understood as "offering" a telecommunications service.<sup>28</sup>

13. Petitioners also contend that *Brand X* does not control here because the Commission's classification goes beyond "just a transmission component"<sup>29</sup> and is an "assertion of comprehensive

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<sup>22</sup> ACA and NCTA assert that even if the Commission does not agree that its petition is likely to succeed on the merits, the Commission still can grant the stay if it finds that the Petition makes "a substantial case on the merits," provided that the Commission concludes that the other three factors required for a stay strongly support such action. ACA/NCTA Petition at 10. Because we do not find that the other three factors strongly support ACA's and NCTA's request for a stay, we decline to reach this issue.

<sup>23</sup> USTelecom *et al.* Petition at 10; ACA/NCTA Petition at 11.

<sup>24</sup> 545 U.S. 967 (2005) ("*Brand X*").

<sup>25</sup> USTelecom *et al.* Petition at 14-15; ACA/NCTA Petition at 13-14.

<sup>26</sup> *Brand X*, 545 U.S. at 986-1000. *See id.* at 992 (holding that "the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission."). *See also 2015 Open Internet Order* at paras. 332-33 (describing the majority, concurring, and dissenting opinions on this point).

<sup>27</sup> *Brand X*, 545 U.S. at 981 (quoting *Chevron U.S.C. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984) (internal citation omitted)).

<sup>28</sup> *2015 Open Internet Order* at paras. 346-54.

<sup>29</sup> ACA/NCTA Petition at 7.

control over the Internet.”<sup>30</sup> But Petitioners’ ignore the *Order*’s definition of BIAS and its lengthy discussion of the scope of that service. As quoted above, the *Order* defines BIAS as a service that “provides the capability to transmit data.”<sup>31</sup> It is, by definition, a transmission service. The *Order* explains that, in this respect, the BIAS service identified and classified in the *Order* is the same as the transmission service discussed in *Brand X* and prior Commission Orders.<sup>32</sup> The Commission further explained that “add-on” information services such as email and online storage that are offered together with BIAS are separable information service offerings that are not covered by the *Order*’s classification or rules.<sup>33</sup> Thus, the *Order* itself makes plain that “[the Commission’s] reclassification of broadband Internet access service involves only the transmission component of Internet access service.”<sup>34</sup>

14. Last, Petitioners argue that Brand X’s discussion was limited to the possible separate offering of “last-mile” transmission service “between and end-user’s customer’s premises and the cable company’s facilities.”<sup>35</sup> That reading of Brand X is created out of whole cloth. The Supreme Court nowhere limited its discussion of transmission to transmission over the “last-mile;” indeed, that term is never used in the opinion, by either the majority or the dissent. Instead, the majority identified the “telecommunications” that cable companies used in providing Internet service as traveling over the “high-speed wire that transmits signals to and from an end user’s computer” without limitation.<sup>36</sup> In any event, the *Order*’s classification of BIAS does not sweep in the entire Internet.<sup>37</sup> The Commission made clear that BIAS does not include, for example, virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services.<sup>38</sup>

15. *Classification of BIAS as a Telecommunications Service.* Petitioners also argue that the Commission erred in finding that BIAS fits the definition of telecommunications service under 47 U.S.C. § 153, contradicted Congressional intent embodied in section 230 of the Act, and failed to follow controlling Commission precedent, including the *Stevens Report*. In the *Order*, the Commission engaged in a lengthy and comprehensive discussion of why BIAS fits the definition of telecommunications service and is not an information service.<sup>39</sup> Petitioners’ assertion that BIAS meets every aspect of the definition of information service<sup>40</sup> largely ignores the Commission’s extensive analysis of this issue.<sup>41</sup> Likewise, Petitioners’ argument that section 230 of the Act confirms that BIAS is an information service<sup>42</sup> fails to address the *Order*’s specific analysis of this issue.<sup>43</sup>

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<sup>30</sup> USTelecom *et al.* Petition at 1.

<sup>31</sup> 2015 *Open Internet Order* at para. 336.

<sup>32</sup> 2015 *Open Internet Order* at n.1257.

<sup>33</sup> 2015 *Open Internet Order* at paras. 341, 356, 362 n.1005, 365.

<sup>34</sup> 2015 *Open Internet Order* at para. 382.

<sup>35</sup> USTelecom *et al.* Petition at 14.

<sup>36</sup> 545 U.S. at 988.

<sup>37</sup> “We are not . . . regulating the Internet, *per se*, or any Internet applications or content.” 2015 *Open Internet Order* at para. 382.

<sup>38</sup> 2015 *Open Internet Order* at para. 340.

<sup>39</sup> 2015 *Open Internet Order* at paras. 306-87.

<sup>40</sup> USTelecom *et al.* Petition at 11-13. *See also* ACA/NCTA Petition at 11-13.

<sup>41</sup> 2015 *Open Internet Order* at paras. 365-81.

<sup>42</sup> USTelecom *et al.* Petition at 11; ACA/NCTA Petition at 12 n.21.

<sup>43</sup> 2015 *Open Internet Order* at para. 386.

16. Petitioners also argue that the Commission’s decision to classify BIAS as a telecommunications service contradicts Commission precedent.<sup>44</sup> Petitioners assert, for example, that the *Stevens Report* definitively found that BIAS is an information service.<sup>45</sup> They, however, again fail to address the *Order*’s consideration of those same arguments, which concluded that they ignore Commission precedent “demonstrating that the relevant statutory definitions are ambiguous, and that classifying broadband Internet access service as a telecommunications service is a permissible interpretation of the Act.”<sup>46</sup> As one example, the *Stevens Report* expressly reserved judgment on whether facilities-based Internet access service provided by facilities-based ISPs qualified as a telecommunications service or an information service.<sup>47</sup>

17. Petitioners briefly engage the *Order*’s analysis of the telecommunications systems management exception, but only to misconstrue the Commission’s finding in this regard and argue that the Commission’s reading of the telecommunications management exception is overly broad.<sup>48</sup> Initially, Petitioners suggest that the *Order* found that BIAS is a telecommunications service merely because it fits within the “narrow” telecommunications management exception.<sup>49</sup> This misconstrues the Commission’s finding. The Commission found that to the extent BIAS is offered along with other capabilities that would fall within the definition of an information service, these other capabilities do not transform what is otherwise a telecommunications service into an information service.<sup>50</sup> Instead, the other capabilities “either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with BIAS, or both.”<sup>51</sup> Where a service that on its own would be an information service, such as caching, is “simply used to facilitate the transmission of information so that users can access other services,” it “falls easily within the telecommunications management exception to the information service definition.”<sup>52</sup> As noted above, where separable offerings—such as an email address supplied by the broadband provider—have been made available alongside the offering of BIAS, such services remain outside the definition of BIAS and nothing in the *Order* suggests that they are subject to the Open Internet rules or regulation as telecommunications services.

18. Petitioners also contend that the Commission’s definition of BIAS is an attempt to evade the D.C. Circuit’s decision in *Verizon v. FCC*,<sup>53</sup> and that the Commission impermissibly subjects interconnection and traffic exchange agreements to Title II without any determination that those services constitute common carriage.<sup>54</sup> Contrary to Petitioners’ arguments, the Commission provided a detailed analysis of its conclusion that BIAS involves the exchange of traffic between a broadband Internet access

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<sup>44</sup> USTelecom *et al.* Petition at 10-13; ACA/NCTA Petition at 11-15.

<sup>45</sup> USTelecom *et al.* Petition at 12-13; ACA/NCTA Petition at 12.

<sup>46</sup> *2015 Open Internet Order* at para. 314.

<sup>47</sup> *2015 Open Internet Order* at para. 315 (citing *Stevens Report* at para. 60 and n.140).

<sup>48</sup> USTelecom *et al.* Petition at 13; ACA/NCTA Petition at 13 n.22 (both discussing the *2015 Open Internet Order* at paras. 366-75).

<sup>49</sup> USTelecom *et al.* Petition at 13 (“The *Order* . . . argues . . . that Internet access services fall within the narrow ‘telecommunications management’ exception to the definition of ‘information services[.]’”).

<sup>50</sup> *2015 Open Internet Order* at para. 365.

<sup>51</sup> *2015 Open Internet Order* at para. 365.

<sup>52</sup> *2015 Open Internet Order* at para. 372.

<sup>53</sup> 740 F.3d 623 (D.C. Cir. 2014).

<sup>54</sup> ACA/NCTA Petition at 14.

provider and connecting networks and that exchange of traffic qualifies as common, not private, carriage.<sup>55</sup>

19. *Adherence to the Administrative Procedure Act.* ACA and NCTA assert that the Commission violated the Administrative Procedure Act (“APA”) because the NPRM allegedly failed to provide adequate notice of the approach adopted and the *Order* is arbitrary and capricious.<sup>56</sup>

20. First, ACA and NCTA argue that the Commission failed to provide adequate APA notice because the NPRM’s discussion of reclassification was allegedly too brief, too general, and differed from the ultimate direction taken on interconnection.<sup>57</sup> The Commission, however, noted that the reclassification of BIAS was expressly identified as a potential course of action in the NPRM, discussed arguments about notice of reclassification, and ultimately found that the actions taken in the *Order* were, in all relevant respects, either expressly raised by, or a logical outgrowth of, the NPRM.<sup>58</sup> The Commission’s NPRM generated extensive and specific comment from the public on every aspect of this proceeding, including reclassification of BIAS, and was more than adequate.<sup>59</sup>

21. ACA’s and NCTA’s initial argument that the *Order* was arbitrary and capricious is that the Commission failed to meet a requirement under the APA to provide a “more substantial justification” when departing from a conflicting prior policy that engendered significant reliance interests.<sup>60</sup> As specifically discussed in the *Order*, the Commission does not bear a special burden in this instance,<sup>61</sup> but rather can find that reconsidering its prior decisions and reaching a different conclusion best reflects the factual record in this proceeding, and will most effectively permit the implementation of sound policy consistent with statutory objectives.<sup>62</sup> Moreover, the Commission considered and rejected the Petitioners’ argument about reliance interests in the *Order*, finding that “the legal status of the information service classification thus has been called into question too consistently to have engendered such substantial reliance interests that our reclassification decision cannot now be sustained absent extraordinary justification.”<sup>63</sup>

22. In their specific allegations, ACA and NCTA challenge as arbitrary and capricious the Commission’s findings that consumers today view BIAS as distinct from other services that are offered by ISPs.<sup>64</sup> In the *Order*, the Commission fully explained that the factual basis upon which it concluded that BIAS today fits the definition of a telecommunications service was not limited to consideration of a few new developments but on an analysis of broad changes in the marketplace, including how the evolution of consumer demand and providers’ marketing of services have affected the marketplace.<sup>65</sup> For instance, regardless of whether consumers may have had the technical capability to use third party services when the Commission first addressed the classification of BIAS, the Commission concluded that the market for BIAS has changed dramatically since that time and that the “widespread penetration of

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<sup>55</sup> 2015 *Open Internet Order* at para. 364.

<sup>56</sup> ACA/NCTA Petition at 15-20.

<sup>57</sup> ACA/NCTA Petition at 18-20.

<sup>58</sup> 2015 *Open Internet Order* at paras. 206, 387, 393-94, 406.

<sup>59</sup> See 2015 *Open Internet Order* at para. 387, n.1101.

<sup>60</sup> ACA/NCTA Petition at 15-18.

<sup>61</sup> 2015 *Open Internet Order* at paras. 357-58.

<sup>62</sup> 2015 *Open Internet Order* at paras. 356-60.

<sup>63</sup> 2015 *Open Internet Order* at para. 360.

<sup>64</sup> ACA/NCTA Petition at 16-17. See also USTelecom *et al.* Petition at 16.

<sup>65</sup> 2015 *Open Internet Order* at paras. 346-54.

broadband Internet access service has led to the development of third-party services and devices and has increased the modular way consumers have come to use them.”<sup>66</sup> Moreover, Petitioners’ argument ignores the Commission’s finding in the *Order* that “even assuming, *arguendo*, that the facts regarding how BIAS is offered had not changed, in now applying the Act’s definitions to these facts, we find that the provision of BIAS is best understood as a telecommunications service.”<sup>67</sup>

23. *Reclassification of Mobile Broadband.* USTelecom *et al.* argue that mobile BIAS is private mobile service exempt from regulation under Title II.<sup>68</sup> Specifically, they contend that because mobile BIAS is interconnected to the Internet and not the telephone network, it cannot be considered an interconnected service and therefore does not meet the definition of commercial mobile service.<sup>69</sup> The Commission considered and rejected this argument, concluding that mobile BIAS today qualifies as a commercial mobile service based on an updated definition of the term “public switched network” and that the mobile BIAS widely available today to millions of subscribers is not “akin to the private mobile service of 1994, such as a taxi dispatch service, services that offered users access to a discrete and limited set of endpoints.”<sup>70</sup> The argument by USTelecom *et al.* also ignores the Commission’s independent conclusion, pursuant to its statutory authority under section 332(d)(3), that mobile broadband Internet access is the “functional equivalent” today of a commercial mobile service.<sup>71</sup>

24. While USTelecom *et al.* acknowledge that Congress gave the Commission authority to define the “public switched network,” they contend that the term cannot be interpreted to include the Internet because Congress has always used it to mean only the telephone network.<sup>72</sup> This argument fails to give sufficient weight to the text of the statute itself and the Commission fully addressed and rejected the same argument in the *Order*.<sup>73</sup> Section 332(d)(2) of the Act uses the term “public switched network” and not “public switched telephone network” and, as USTelecom *et al.* recognize, expressly delegates authority to the Commission to define the term “public switched network.”<sup>74</sup> In the *Order*, the Commission reasonably concluded that “what is clear from the statutory language is not what the definition of ‘public switched network’ was intended to cover but rather that Congress expected the notion to evolve and therefore charged the Commission with the continuing obligation to define it.”<sup>75</sup> The Commission has long understood section 332(d)(2) as embodying Congress’s expectation both that the definition of “public switched network” should evolve and that “a mobile service may be classified as private only if it is neither a [commercial mobile service] nor the functional equivalent of a [commercial mobile service].”<sup>76</sup>

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<sup>66</sup> 2015 *Open Internet Order* at paras. 347.

<sup>67</sup> 2015 *Open Internet Order* at para. 360 n.993.

<sup>68</sup> USTelecom *et al.* Petition at 17-19.

<sup>69</sup> USTelecom *et al.* Petition at 17-18.

<sup>70</sup> 2015 *Open Internet Order* at paras. 388-408.

<sup>71</sup> 2015 *Open Internet Order* at para. 404.

<sup>72</sup> USTelecom *et al.* Petition at 19.

<sup>73</sup> 2015 *Open Internet Order* at paras. 395-99.

<sup>74</sup> 47 U.S.C. § 332(d)(2); USTelecom *et al.* Petition at 19.

<sup>75</sup> 2015 *Open Internet Order* at para. 396.

<sup>76</sup> *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1436-37 at para. 59, 1445-46 at para. 76 (1994).



25. USTelecom *et al.* also argue that the Commission acted arbitrarily in reversing its prior approach to applying open Internet requirements to mobile BIAS.<sup>77</sup> Contrary to Petitioners' argument, however, in the *Order* the Commission provided a thorough analysis and detailed explanation of the changes in the mobile broadband marketplace that warrant a revised approach.<sup>78</sup> Moreover, the Commission's decision to apply the same open Internet requirements to both fixed and mobile BIAS was not based just on the fact that mobile broadband has become an essential means of access to the Internet for hundreds of millions of consumers. Rather, the Commission found that, because of the widespread use of mobile service, "maintaining a regime under which fewer protections apply in a mobile environment risks creating a substantively different Internet experience for mobile broadband users as compared to fixed broadband users."<sup>79</sup> The Commission also based its decision on other factors, including the incentives and ability of mobile broadband providers to engage in conduct that would be harmful to the virtuous cycle of innovation.<sup>80</sup> USTelecom *et al.* fail to engage the Commission's analysis on these issues.

26. Finally, USTelecom *et al.* assert that the Commission did not provide adequate notice because the NPRM did not propose to amend the Commission's rules to redefine the term public switched network, adopt a new functional equivalence test, or reverse its prior position that the functionalities of third-party applications are not capabilities of the mobile broadband service itself.<sup>81</sup> On the contrary, the Commission thoroughly articulated in the *Order* why revising the definition of "public switched network" and classifying mobile BIAS as a commercial mobile service were a logical outgrowth of the proposals in the NPRM.<sup>82</sup> Those proposals expressly asked whether mobile BIAS would fit within the definition of "commercial mobile service," and specifically cited to the pertinent Commission rule implementing that definition.<sup>83</sup> The NPRM further pointed commenters to the pending *Broadband Classification NOI*, which asked "[t]o what extent should section 332 of the Act affect our classification of wireless broadband Internet services?" and directed that the record be refreshed in that proceeding, "including the inquiries contained herein."<sup>84</sup> Furthermore, the Commission's conclusion that mobile BIAS is not a private mobile service because it is the functional equivalent of a commercial mobile service independently supports the classification of such service as a telecommunications service. Finally, the *Order* recognizes that a number of parties — including some of these same Petitioners and their principal members — directly addressed on the record the application of section 332(d) and the Commission's implementation of rules to mobile BIAS.<sup>85</sup>

27. For the reasons stated above, Petitioners have failed to demonstrate a likelihood of success on the merits.<sup>86</sup>

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<sup>77</sup> USTelecom *et al.* Petition at 20-21.

<sup>78</sup> 2015 *Open Internet Order* at paras. 86-101.

<sup>79</sup> 2015 *Open Internet Order* at para. 92.

<sup>80</sup> 2015 *Open Internet Order* at paras. 91, 94-101.

<sup>81</sup> USTelecom *et al.* Petition at 19.

<sup>82</sup> 2015 *Open Internet Order* at paras. 393-94.

<sup>83</sup> 2015 *Open Internet Order* at para. 393 (citing NPRM). See also 2014 *Open Internet NPRM*, 29 FCC Rcd at 5614, para. 150 & n.307.

<sup>84</sup> See 2015 *Open Internet Order* at para. 393 & nn.1125-1131. See also 2014 *Open Internet NPRM*, 29 FCC Rcd at 5613-14, para. 149 & n.302.

<sup>85</sup> 2015 *Open Internet Order* at para. 394.

<sup>86</sup> See *supra* n.21 (citing judicial decisions establishing the standard for a stay).

**B. Petitioners Will Not Suffer Irreparable Injury**

28. Several general principles govern the irreparable injury inquiry. First, “the injury must be both certain and great; it must be actual and not theoretical.”<sup>87</sup> A petitioner must also “substantiate the claim that the irreparable injury is ‘likely’ to occur. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur.”<sup>88</sup> Further, the mere fact of government regulation and the associated costs of compliance with that regulation are insufficient to prove irreparable injury.<sup>89</sup> Finally, litigation costs associated with new regulation, “even substantial and unrecoupable cost, does not constitute irreparable injury.”<sup>90</sup>

29. *Title II and the General Open Internet Conduct Rule.* As noted above, Petitioners do not seek a stay of any of the Commission’s three “bright line” rules, with which ACA and NCTA claim they comply.<sup>91</sup> Rather, their claims of irreparable injury reduce principally to the requirement of complying with the general open Internet conduct rule and those few core Title II standards as to which the Commission did not exercise statutory forbearance authority. Thus, Petitioners suggest that “broad yet uncertain Title II requirements” will cause Petitioners to incur potential compliance costs and potential future litigation costs that will negatively impact Petitioners’ businesses.<sup>92</sup> Petitioners similarly allege that the prohibition on unreasonably interfering with or disadvantaging the ability of consumers and edge providers to reach one another on the Internet will create uncertainty, which will “stifle investment and innovation and harm consumers.”<sup>93</sup>

30. Petitioners’ broad arguments regarding an environment of uncertainty ignore that they already were subject to a case-by-case standard governing their conduct.<sup>94</sup> For over two years while the 2010 Open Internet rules were in effect, all fixed broadband providers were subject to a prohibition on “unreasonable discrimination.”<sup>95</sup> Moreover, all BIAS providers are subject to general legal standards under other federal and state laws and regulations that govern their conduct with respect to protecting consumers and competition. Using Petitioners’ logic, the simple act of being made subject to such general conduct standards would have irreparably harmed their businesses’ investment, innovation, and customers. It did not. As the *Order* explains, neither applying a “just and reasonable” standard—nor a “no unreasonable interference” standard—will harm investment, innovation, or consumers, a fact supported by a decade of investment prior to reclassification and discussed at length in the *Order*.<sup>96</sup>

<sup>87</sup> *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

<sup>88</sup> *Wisconsin Gas Co.*, 758 F.2d at 674.

<sup>89</sup> *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976) (“Any time that a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction.”).

<sup>90</sup> *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *Morgan Drexen, Inc. v. CFPB*, No. 13-5342, slip op at 19 n. 3 (D.C. Cir. May 1, 2015).

<sup>91</sup> USTelecom *et al.* Petition at 2 & n.2; ACA/NCTA Petition at 1 n.3.

<sup>92</sup> USTelecom *et al.* Petition at 21-22.

<sup>93</sup> USTelecom *et al.* Petition at 24.

<sup>94</sup> USTelecom *et al.* Petition at 21; *see* ACA/NCTA Petition at 20-21.

<sup>95</sup> *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5600-01, at paras. 113-14 & n.236 (demonstrating that the prohibition against unreasonable discrimination was in effect for two years from its implementation until the D.C. Circuit’s holding in the *Verizon* decision).

<sup>96</sup> *2015 Open Internet Order* at paras. 409-25.

31. Even so, the Commission provided significant additional regulatory relief and certainty by forbearing from large portions of Title II and its implementing rules.<sup>97</sup> The Commission forbore from 27 provisions of Title II and over 700 rules in crafting the framework about which Petitioners complain.<sup>98</sup> The *Order* explains “mobile voice services have been regulated under a similar light-touch Title II approach since 1995—and investment and usage boomed.”<sup>99</sup> Petitioners’ claims are thus additionally belied by a history of successful investment and innovation under Title II, as explained in the *Order*.<sup>100</sup>

32. Finally, Petitioners’ alleged harms are insufficiently concrete, and are associated with the mere fact of being subject to regulation beyond the “bright-line” rules adopted in the *Order* or the possibility of future litigation pursuant to that regulation. Rather, Petitioners argue that they will expend resources on compliance costs and speculate that they will be subject to litigation.<sup>101</sup> As the Supreme Court has noted, litigation costs are not irreparable harm.<sup>102</sup> Nor are costs of regulatory compliance, in the normal course.<sup>103</sup> Even assuming these were allegations that are properly within the scope of our consideration for what constitutes irreparable harm, Petitioners do not make a sufficient case that these are “certain and great” harms.<sup>104</sup>

33. *Privacy Protections.* Petitioners allege that the Commission’s reclassification of BIAS creates “significant uncertainty” as to whether customized outbound marketing programs can continue in their current form<sup>105</sup> or will potentially “subject providers to enforcement and liability if they guess wrong as to how ‘broadband-related CPNI’ is to be treated under Section 222(c).”<sup>106</sup> Petitioners further assert that the Commission’s interpretation of section 222(a) requires carriers to apply detailed authentication requirements and provide customers with information about their accounts only if specific password procedures are followed. Petitioners assert that implementing those “minimum” procedures in the broadband context will be costly and difficult, and will also damage the goodwill of Petitioners’ members because customers will be frustrated when they are subjected “to a cumbersome, unnecessary process in accessing their own accounts.”<sup>107</sup>

34. The harms alleged by Petitioners with respect to section 222 presuppose that the Commission has imposed prescriptive regulations on the use of broadband-related consumer proprietary network information (CPNI). In fact, the *Order* and related Commission activities make clear that the Commission is not applying its existing telephone-centric CPNI regulations to broadband-related CPNI, but is taking a careful and thoughtful approach in this area, stating that “the Commission’s current rules implementing section 222” were not necessarily “well suited to broadband Internet access services.”<sup>108</sup>

<sup>97</sup> 2015 *Open Internet Order* at paras. 440-527.

<sup>98</sup> 2015 *Open Internet Order* at paras. 456-536.

<sup>99</sup> 2015 *Open Internet Order* at para. 39.

<sup>100</sup> 2015 *Open Internet Order* at paras. 409-25.

<sup>101</sup> USTelecom *et al.* Petition at 22; ACA/NCTA Petition at 20-21.

<sup>102</sup> *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

<sup>103</sup> *A.O. Smith Corp.*, 530 F.2d at 527.

<sup>104</sup> *Wisconsin Gas Co.*, 758 F.2d at 674.

<sup>105</sup> See USTelecom *et al.* Petition at 26-27; ACA/NCTA Petition at 24 (asserting that Petitioners may need to change their existing practices regarding the use of broadband customer CPNI to market other services to them, such as cable television and voice services).

<sup>106</sup> See USTelecom *et al.* Petition at 26-27; ACA/NCTA Petition at 24 n.47.

<sup>107</sup> ACA/NCTA Petition at 25-26.

<sup>108</sup> 2015 *Open Internet Order* at para. 467.

Petitioners reference the password authentication requirements in section 64.2010 of the Commission's rules,<sup>109</sup> and assert that the costs of complying with those requirements will cause irreparable harm in terms of costs and customer goodwill. However, in the *Order*, the Commission expressly declined to apply section 64.2010 and other pre-existing CPNI regulations to BIAS, "pending the adoption of rules to govern broadband Internet access service in a separate rulemaking proceeding."<sup>110</sup> Petitioners also argue that section 222(c) itself prohibits them from using broadband-related CPNI to market other services to existing customers.<sup>111</sup> However, they do not credibly quantify the nature or extent of any associated harm, making this harm speculative.<sup>112</sup> Further demonstrating the Commission's careful approach to implementing section 222 to broadband Internet access, on April 28, 2015, Commission staff held a public workshop on broadband consumer privacy where Commission staff noted the Commission's decision not to apply the specific existing CPNI rules to BIAS as a matter of course, and Commission Chairman Tom Wheeler referred to the workshop as the "*beginning* of a very important conversation."<sup>113</sup>

35. The Petitioners' allegations about the harm of section 222's application to BIAS also rest on the faulty assumptions that providers of these services did not previously face regulatory oversight with respect to the protection of subscriber privacy. In fact, broadband providers large and small were not free before the *Order* from potential government action for failure to protect the security of broadband customer information and/or notify customers of any breach. Given that multiple other governmental entities could have taken action against BIAS providers for privacy and security violations, the fact that the Commission now make take similar action cannot be irreparable harm.

36. For instance, BIAS providers have faced threat of action by the FTC for any "unfair or deceptive acts or practices," which the FTC has interpreted on a case-by-case basis without implementing rules.<sup>114</sup> Since 2002, the FTC has taken over 50 actions against companies for failing to employ reasonable data security measures.<sup>115</sup> In 2014, a federal district court affirmed the FTC's authority to challenge unfair data security practices using its Section 5 authority.<sup>116</sup> Second, 47 states and the District

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<sup>109</sup> See 47 C.F.R. § 64.2010.

<sup>110</sup> 2015 *Open Internet Order* at para. 462.

<sup>111</sup> ACA/NCTA Petition at 24.

<sup>112</sup> For example, AT&T "estimates" that, were it to cease its marketing programs that use broadband-related CPNI, it would lose over \$800 million per year in lost revenues from selling other products and services to its broadband customers through use of their CPNI. See USTelecom *et al.* Petition, Collins *et al.* Decl. para. 19. However, AT&T provides no explanation or support for the calculation of this figure, and AT&T concedes that the estimate does not attempt to account for other substitute methods of marketing. *Id.* at para. 20. More fundamentally, as explained above, the *Order* makes clear that pre-existing CPNI regulations do not now apply to BIAS. We therefore cannot credit the estimate of harm, quite apart from whether lost sales opportunities are the kind of irreparable injury that outweighs the important privacy benefits embodied in section 222's protections for consumers and the public interest.

<sup>113</sup> See Broadband Consumer Privacy Workshop, April 28, 2015, at 6:54 (video available at <https://www.fcc.gov/events/wcb-and-cgb-public-workshop-broadband-consumer-privacy>); see also *id.* at 38:45 (Lisa Hone, Associate Bureau Chief, Wireline Competition Bureau, stating that "this is the beginning of this conversation").

<sup>114</sup> Section 5(a)(1) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1).

<sup>115</sup> See Federal Trade Commission, 2014 Privacy and Data Security Update, at 5, at [https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate\\_2014.pdf](https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate_2014.pdf). For instance, "[i]n 2012, the FTC filed suit against global hospitality company Wyndham Worldwide Corporation and three of its subsidiaries for alleged data security failures that led to three data breaches at Wyndham hotels in less than two years." *Id.*

<sup>116</sup> *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014).

of Columbia have adopted laws related to data security.<sup>117</sup> As the National Conference of State Legislatures (NCSL) has explained, “[s]ecurity breach laws typically have provisions regarding who must comply with the law (e.g., businesses, data/ information brokers, government entities, etc.); definitions of ‘personal information’ (e.g., name combined with SSN, drivers license or state ID, account numbers, etc.); what constitutes a breach (e.g., unauthorized acquisition of data); requirements for notice (e.g., timing or method of notice, who must be notified); and exemptions (e.g., for encrypted information).”<sup>118</sup> Third, with respect to any provider of cable television service,<sup>119</sup> section 631 of the Act already imposes privacy and data security requirements with respect to the offering of “any cable service *or other service*” delivered using the cable system.<sup>120</sup> Moreover, to the extent that Petitioners claim that the Commission’s implementation of section 222 exposes them to the risk of unjust “after-the-fact forfeitures,”<sup>121</sup> we note that the Commission cannot impose a penalty in the absence of “fair notice of what is prohibited.”<sup>122</sup> The notion, therefore, that providers of broadband would suffer irreparable harm if required to meet basic privacy and data security standards has no bearing in fact.

37. Petitioners’ own statements and actions in other contexts contradict their assertions of harm from application of the basic privacy requirements of section 222 of the Act, such as a requirement to obtain customer “approval” for use of sensitive information or protect the “confidentiality” of proprietary information about the customer.<sup>123</sup> These statements and actions illustrate that these companies already are familiar with the need to employ reasonable privacy practices, and apparently obtain some form of approval for outbound marketing programs. Further, we observe that all BIAS

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<sup>117</sup> See National Conference of State Legislatures, *Security Breach Notification Laws*, (Jan. 12, 2015), at <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>.

<sup>118</sup> *Id.*

<sup>119</sup> This would include all of the declarants in the ACA/NCTA Petition and, at a minimum, many of USTelecom’s members that offer subscription video service.

<sup>120</sup> 47 U.S.C. § 551 (emphasis added); see also Congressional Research Service, RL34693, *Privacy Law and Online Advertising*, at 7- 10 (Jan. 20, 2010) (discussing conflicting federal case law concerning whether and to what extent the requirements of section 631 of the Act apply to BIAS offered by providers of cable services).

<sup>121</sup> USTelecom *et al.* Petition, AT&T Decl. at paras. 6, 28.

<sup>122</sup> *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012).

<sup>123</sup> Comments of the National Cable & Telecommunications Association, *Privacy in an Era of Rapid Change*, FTC File No. P095416, at 1-2 (Feb. 11, 2011), available at [https://www.ftc.gov/sites/default/files/documents/public\\_comments/preliminary-ftc-staff-report-protecting-consumer-privacy-era-rapid-change-proposed-framework/00432-58038.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/preliminary-ftc-staff-report-protecting-consumer-privacy-era-rapid-change-proposed-framework/00432-58038.pdf). (“For cable operators, the privacy of their customers is not a new concern. Since long before they began offering broadband service, cable operators have been taking steps to protect customers of their cable television service against any undesired disclosure of their personally identifiable information (‘PII’) and their purchasing and viewing decisions. Since 1984, such measures have been required by federal law. But they’re also a business imperative – especially in today’s competitive broadband marketplace.”); Comments of AT&T before the Department of Commerce Internet Policy Task Force, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, at 10 (Jan. 28, 2011), available at [https://www.ftc.gov/sites/default/files/documents/public\\_comments/preliminary-ftc-staff-report-protecting-consumer-privacy-era-rapid-change-proposed-framework/00420-58060.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/preliminary-ftc-staff-report-protecting-consumer-privacy-era-rapid-change-proposed-framework/00420-58060.pdf). (describing the “complex regulatory system” of data protections found in overarching federal and state obligations); AT&T, AT&T Privacy Policy, <http://www.att.com/gen/privacy-policy?pid=2506> (last visited May 4, 2015) (stating its policy to, among other things, “protect customers’ privacy and keep personal information safe” and “give customers control about how AT&T uses customers’ information for marketing purposes”); Cox Communications, *Annual Notice to Cox Customers, Your Privacy Rights as a Cox Customer and Related Information*, 2015 Customer Information (Jan. 1, 2015), <http://www.cox.com/aboutus/policies/annual-privacy-notice.cox> (last visited May 4, 2015) (committing to let its customers “know how we will collect and use your Personally Identifiable Information”).

providers have been under an obligation under the transparency rule adopted in the *2010 Open Internet Order* to disclose their privacy policies, including whether network management practices entail inspection of network traffic and whether traffic information is stored, provided to third parties, or used by the carrier for non-network management practices.<sup>124</sup>

38. *Traffic Exchange*. Adding to their claims of irreparable harm, Petitioners assert that the Commission's assertion of jurisdiction over traffic exchange disputes "threatens to undo countless interconnection agreements,"<sup>125</sup> "exposes [broadband providers] to costly and unpredictable litigation,"<sup>126</sup> and "prevent[s] [broadband providers] from entering into fair, market-based agreements."<sup>127</sup> We disagree.

39. To support their allegations, Petitioners cite to the inapposite *Iowa Utils. Bd. v. FCC*, which involved specific rate regulation by the Commission.<sup>128</sup> Here, however, the Commission is not regulating specific rates or setting prices. It is merely asserting that broadband provider conduct—even at the point of interconnection—must be just and reasonable under sections 201 and 202 of the Communications Act.<sup>129</sup> The case-by-case approach adopted in the *Order* does not demonstrate "ignorance" on behalf of the Commission as alleged by USTelecom *et al.*<sup>130</sup> Rather, it reflects the Commission's commitment to avoid *ex ante* prescriptive regulatory intervention in "an area that historically has functioned without significant Commission oversight" and thus the adoption of a "light touch" regulatory backstop.<sup>131</sup>

40. Moreover, Petitioners do not convincingly demonstrate a harm caused by the *Order*. They assert that some Internet traffic exchange providers have been emboldened by the Commission's assertion of jurisdiction to seek what Petitioner argues are unreasonable traffic exchange arrangements, holding broadband providers hostage with the threat of a Commission enforcement action.<sup>132</sup> But this is not new. Public reports of edge providers and transit providers demanding settlement-free peering from BIAS providers predate any action the Commission took in the *Order* itself.<sup>133</sup> Petitioners' assertions that meritless complaints will provide negotiating leverage are also unpersuasive.<sup>134</sup> The *Order* clearly states that "should a complaint arise regarding BIAS provider Internet traffic exchange practices, practices by edge providers (and their intermediaries) would be considered as part of the Commission's evaluation as to whether BIAS provider practices were 'just and reasonable' under the Act."<sup>135</sup>

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<sup>124</sup> See *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and *Order*, 25 FCC Rcd 17905, 17939, para. 56 (2010) (*2010 Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014).

<sup>125</sup> ACA/NCTA Petition at 21.

<sup>126</sup> ACA/NCTA Petition at 21.

<sup>127</sup> USTelecom *et al.* Petition at 28-29.

<sup>128</sup> ACA/NCTA Petition at 23; USTelecom *et al.* Petition at 29.

<sup>129</sup> *2015 Open Internet Order* at paras. 202-05.

<sup>130</sup> *2015 Open Internet Order* at paras. 202-05.

<sup>131</sup> *2015 Open Internet Order* at para. 203.

<sup>132</sup> USTelecom *et al.* Petition at 28; USTelecom *et al.* Petition, Poll Decl. at paras. 9-13; ACA/NCTA Petition, Da Silva Decl. at paras. 3-8.

<sup>133</sup> See *2015 Open Internet Order* at paras. 199-201 & n.499 (citing reports of prior Internet traffic exchange disputes).

<sup>134</sup> See ACA/NCTA Petition, Da Silva Decl. at paras. 3-8; Cogent Opposition at 5 (noting that "Cogent's preference . . . is that such interconnection agreements be negotiated in good faith").

<sup>135</sup> *2015 Open Internet Order* at para. 205 n.525.

41. *Pole Attachments.* ACA and NCTA assert that “reclassification will trigger obligations for cable operators that they are offering telecommunications services” and that “public utilities have a strong financial incentive to use reclassification to justify increasing the rates that they charge cable operators for pole attachments.”<sup>136</sup>

42. ACA and NCTA are correct that Commission rules require cable providers to “notify pole owners upon offering telecommunications services,”<sup>137</sup> but do not make a case that this constitutes irreparable harm. As previously noted, regulatory compliance costs in the normal course are not irreparable harm.<sup>138</sup> This simple notice requirement, to the extent newly triggered for some cable operators by the reclassification of BIAS, is a standard requirement equally applicable to all cable providers who offer telecommunications services.

43. Petitioners’ argument that they may face increased fees as a result of reclassification also is not persuasive.<sup>139</sup> As Petitioners recognize the *Order* “caution[s] utilities against relying on this decision to that end” and states that the Commission “can and will promptly take further action in that regard if warranted.”<sup>140</sup> Further, providers are protected from irreparable injury by the Commission’s rules. Any rate increase must be noticed to the provider 60 days in advance, and the provider may seek a stay of any rate increase.<sup>141</sup> Finally, to the extent that any situations remain in which the telecom and cable rate formulas for pole attachments produce different results, the Commission is taking its statements in the *Order* seriously. For instance, on May 5, 2015, the Wireline Competition Bureau issued a Public Notice seeking to refresh the record in response to NCTA’s petition for reconsideration or clarification of the *2011 Pole Attachments Order*, which asks the Commission to clarify its rules to ensure that the intent of the 2011 reforms is not thwarted.<sup>142</sup>

44. *Taxes and Fees.* ACA’s and NCTAs’ assertions regarding the irreparable harms they will face as a result of new taxes and fees are also unpersuasive. Petitioners assert that the Commission’s prior classification was the basis for Petitioners’ avoidance of a variety of taxes and fees, including new franchise fees and higher property taxes.<sup>143</sup> Petitioners claim that “[s]tates and localities may therefore use reclassification as a justification for seeking to impose many new taxes and fees on broadband providers.”<sup>144</sup> However, Petitioners’ bare speculation that state and local entities may have the authority

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<sup>136</sup> ACA/NCTA Petition at 26-27.

<sup>137</sup> 47 C.F.R. § 1.1403(e).

<sup>138</sup> *A.O. Smith Corp.*, 530 F.2d at 527.

<sup>139</sup> In 2011, the Commission brought the pole attachment rates paid by cable providers and telecommunications service providers closer to parity, which NCTA praised as “provid[ing] much-needed regulatory certainty that will permit broadband providers to extend their networks to unserved communities while fairly compensating pole owners.” See Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association, COMPTTEL, and tw telecom inc., WC Docket No. 07-245, GN Docket No. 09-51, (filed June 8, 2011).

<sup>140</sup> *2015 Open Internet Order* at para. 413 n.1207; ACA/NCTA Petition at 27.

<sup>141</sup> 47 C.F.R. § 1.1403(c)-(d).

<sup>142</sup> *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011); Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association, COMPTTEL, and tw telecom inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011); Parties Asked to Refresh Record Regarding Petition to Reconsider Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments, WC Docket No. 07-245, GN Docket No. 09-51, Public Notice, DA 15-542 (WCB2015).

<sup>143</sup> ACA/NCTA Petition at 28.

<sup>144</sup> ACA/NCTA Petition at 28.

to impose new taxes and fees as a result of the *Order* does not qualify as an injury “of such imminence that there is a ‘clear and present’ need for equitable relief.”<sup>145</sup>

45. As the Commission noted in the *Order*, “the recently reauthorized Internet Tax Freedom Act (ITFA) prohibits states and localities from imposing ‘[t]axes on Internet access.’”<sup>146</sup> This prohibition applies irrespective of the Commission’s classification of BIAS.<sup>147</sup> ACA and NCTA nonetheless argue that the ITFA may not preclude taxation of broadband providers in certain instances, and that reclassification may therefore result in “new franchise fees” and “increased property taxes” levied by states or political subdivisions.<sup>148</sup> For example, ACA and NCTA allege that “several states” assess property taxes for telecommunications services using a “much less favorable” methodology than that used for cable operators.<sup>149</sup> And, even if a state at some future point made the decision to do so, Petitioners themselves state that they “will have strong arguments that these taxes and fees are preempted and thus unenforceable.”<sup>150</sup> Thus, Petitioners have failed to show how any such harms amount to imminent and certain irreparable injury.

46. Similarly, regarding franchise fees, the Petition argues that “[m]any franchising authorities impose separate franchise fees” on cable and telecommunications services, and that “these authorities may use the *Order*’s reclassification of broadband to impose separate fees on the broadband services of cable operators.”<sup>151</sup> However, the *Order* expressly disapproves of this type of action by franchise authorities and, in any event, Petitioners again fail to provide evidence regarding the likelihood or imminence of this outcome.<sup>152</sup> In any event, Petitioners’ unsubstantiated speculation regarding the impact of the *Order* on future taxes and fees does not demonstrate the type of irreparable harm that is required to support a petition for stay of our rules.<sup>153</sup>

### C. The Requested Stay Will Result in Harm to Others and is Contrary to the Public Interest

47. As described below, we find that the Petitioners failed to demonstrate that third parties will not be harmed if we grant the stay petitions. For the same reasons, we conclude that the stay requests

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<sup>145</sup> *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 307 (D.D.C.), *aff’d*, 548 F.2d 977 (D.C. Cir.1976)). Indeed, courts have long held that injunctive relief “will not be granted against something merely feared as liable to occur at some indefinite time.” *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

<sup>146</sup> 2015 *Open Internet Order* at para. 430.

<sup>147</sup> S. Comm. On Commerce, Sci. & Transp., Internet Tax Nondiscrimination Act of 2003, S. Rep. No. 108-155, at 2 (Sept. 29, 2003), *reprinted in* 2004 U.S.C.C.A.N. 2435, 2437.

<sup>148</sup> ACA/NCTA Petition at 28.

<sup>149</sup> ACA/NCTA Petition at 28 n. 53.

<sup>150</sup> ACA/NCTA Petition at 28.

<sup>151</sup> ACA/NCTA Petition at 28 n.52.

<sup>152</sup> *See* ACA/NCTA Petition at 28.

<sup>153</sup> *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (noting that it is “well settled that economic loss does not, in and of itself, constitute irreparable harm” and denying a petition for stay “premised . . . upon unsubstantiated and speculative allegations of recoverable economic injury”). We note that Petitioners’ claims regarding “grandfathered” state taxes suffer from many of the same deficiencies. *See* ACA/NCTA Petition at 28 n.52-54; ACA/NCTA Petition, Simmons Decl. at paras. 16-17. Petitioners argue that their “members operating in these States may be required to pay . . . taxes that apply to ‘telecommunications service’ providers.” ACA/NCTA Petition at 28 n.52. Petitioners, however, do not show how these unspecified economic costs rise to the level of irreparable harm. *See Wisconsin Gas Co.*, 758 F.2d at 674 (“Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.”).



are contrary to the public interest. Petitioners allege that because they do not seek a stay of the three bright-line open Internet rules, there is not a sufficient threat of harm to others or to the public interest to warrant denial of their stay requests.<sup>154</sup> Rather, they contend that granting their stay requests would maintain the *status quo* with respect to their own regulatory status and thereby advance the public interest by providing regulatory continuity and stability and promoting investment.<sup>155</sup> The record and the Commission's analysis in the *Order* belie these claims, and we find that these prongs of the standard weigh against the grant of Petitioners' stay requests. As noted above, the Commission found that bright line rules were insufficient to protect against all broadband provider conduct harmful to Internet openness.<sup>156</sup> To protect against such conduct, the Commission adopted mechanisms for case-by-case evaluation of broadband provider conduct—the no-unreasonable interference/discrimination standard and the 201 and 202 framework for traffic exchange.<sup>157</sup> Granting the Petitioners' requested stay would eliminate these important regulatory backstops against the harms to consumers and innovators that the Commission sought to address through the aggregate regulatory measures adopted in the *Order*.<sup>158</sup> The record revealed conduct occurring in the marketplace today not addressed by the three bright-line rules and for which the Commission needs the case-by-case review mechanisms to evaluate and take action as warranted to avoid harm to the open Internet.<sup>159</sup> Indeed, the backstop provided by the case-by-case review mechanisms are needed to avoid having the bright-line rules become a roadmap for problematic conduct. For example, parties could use conduct at the point of interconnection to evade the bright-line rules.<sup>160</sup>

48. Regarding the Petitioners criticism of the application of section 222 of the Act to BIAS, we also observe that there is a strong public interest in ensuring that consumers' privacy interests are protected, especially when using communications services. Consumers are uniquely dependent on telecommunications networks to communicate some of their most personal information; therefore, staying the reclassification of BIAS would not favor the public interest. For instance, WinDBreak points to the Commission's *TerraCom* case as justifying its fear of the application of section 222 to its BIAS. In that case, however, the Commission proposed penalties with respect to information about telephone service customers of a company that failed to take even the most basic measures to protect the security of sensitive information such as social security numbers—making that information available on an

<sup>154</sup> ACA/NCTA Petition 29-30; USTelecom *et al.* Petition at 29-30.

<sup>155</sup> ACA/NCTA Petition 29-30; USTelecom *et al.* Petition at 29-30.

<sup>156</sup> See *supra* at para. 4; 2015 *Open Internet Order* at paras. 135-36.

<sup>157</sup> 2015 *Open Internet Order* at paras. 108, 135-36, 194-206.

<sup>158</sup> See, e.g., 2015 *Open Internet Order* at paras. 138-53 (providing guidance regarding the rule and in that context discussing examples of concerns about provider conduct arising outside the scope of the three bright line rules); *id.* at paras. 196-206 (discussing trends in Internet traffic exchange and associated disputes that have arisen); *id.* at App. B, para. 62 (finding with respect to the no unreasonable interference/disadvantage rule that “the approach we adopted provides sufficient certainty and guidance to consumers, broadband providers, and edge providers—particularly smaller entities that might lack experience dealing with broadband providers—while also allowing parties flexibility in developing new services.”). See generally, *id.* at paras. 60-103 (discussing the history and continuing need for open Internet protections and for Commission action to preserve Internet openness).

<sup>159</sup> See, e.g., 2015 *Open Internet Order* at para. 151 (discussing concerns expressed by some filers that certain sponsored data plans “may hamper innovation and monetize artificial scarcity” along with arguments from other filers claiming that there are benefits from such plans); *id.* at para. 153 (discussing concerns expressed by some filers that certain data caps and usage-based pricing plans can be used to disadvantage competing over-the-top providers along with arguments from other filers that there are benefits from such arrangements); *id.* at paras. 196-206 (discussing trends in Internet traffic exchange disputes).

<sup>160</sup> 2015 *Open Internet Order* at para. 205 (“[B]roadband Internet access providers have the ability to use terms of interconnection to disadvantage edge providers and that consumers’ ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs.”); see also Cogent Opposition at 5-6.

unsecured server reachable by a simple Google search—contrary to the company’s own assertions to customers about its security practices. The Commission also found an apparent violation by TerraCom for failing to notify customers that their data had been breached.<sup>161</sup> Rather than demonstrating government overreach, this case demonstrates appropriate protection of consumers for an egregious breach of basic privacy protections.<sup>162</sup>

49. As the Commission observed, “communications networks are most vibrant, and best able to serve the public interest, when consumers are empowered to make their own decisions about how networks are to be accessed and utilized.”<sup>163</sup> In this respect, the Commission’s *Order* maintains the *status quo* of an open Internet, which the Commission has committed to protect and promote since 2005.<sup>164</sup> The record here was replete with evidence that the regulatory regime adopted in the *Order* is both essential to protect consumers and innovators against harms arising from a lack of openness and best serves the public interest.<sup>165</sup> Based on the analysis in the *Order* and the robust underlying record, we conclude that the requested stay is likely to result in harm to consumers and innovators and, for the same reasons, would be counter to the public interest.

#### IV. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 4(i), 4(j), 201, 202, and 303(r) and of the Communications Act of 1934, as amended, and the authority contained in section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 154(i)-(j), 155, 201, 202, 303(r), 1302, and the authority delegated pursuant to sections 0.91, 0.291, 0.131, and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 0.131, and 0.331, this Order Denying Stay Petitions in GN Docket No. 14-28 IS ADOPTED.

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<sup>161</sup> See *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 13325, 13325, para. 2 (2014).

<sup>162</sup> See *2015 Open Internet Order* at para. 462 n.1381.

<sup>163</sup> *2015 Open Internet Order* at para. 60.

<sup>164</sup> *2015 Open Internet Order* at paras. 64-69.

<sup>165</sup> See generally, *2015 Open Internet Order* at paras. 75-103 (discussing the continuing need for open Internet protections and for Commission action to preserve Internet openness). See also *id.* at paras. 86-101 (discussing factors persuading the Commission “to apply the same set of Internet openness protections to both fixed and mobile networks”); *id.* at para. 137 (discussing the advantages of the no-unreasonable interference/disadvantage standard relative to the no unreasonable discrimination standard adopted by the Commission in 2010).

51. IT IS FURTHER ORDERED that the petitions for stay pending judicial review of United States Telecom Association, CTIA-The Wireless Association, AT&T Inc., Wireless Internet Service Providers, CenturyLink, American Cable Association, and the National Cable & Telecommunications Association Committee ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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